LIABILITY IN THE ADMIRALTY FOR INJURIES TO SEAMEN.

CONSIDERING the antiquity of the maritime law and the care which the courts of admiralty have always exercised to safeguard the interests of seamen, it might be expected that the rights of mariners before the law would now be clearly established in all particulars. But upon undertaking to investigate the precise nature and extent of the liability of vessel and owners for personal injuries received by seamen, one discovers many unsettled questions, and the task of ascertaining the recognized rights of seamen for such injuries is by no means free from difficulty. An attempt to analyze the law upon the subject ought, therefore, to be of some benefit.

A seaman, in his capacity as such, may receive injury in a number of ways.

I. He may be injured in the service of the ship by accident, through no fault of owners, master, or crew.

II. He may be injured through the negligence of another member of the ship's company.

III. He may be injured through the breaking of the rigging, or of some appliance of the ship, due to its defective condition.

IV. His health may be injured, either temporarily or permanently, through lack of proper provisions and medicines in the ship's equipment, or because of the master's failure to furnish him with the same from the supply on board.

V. An original injury to a seaman may be aggravated or made permanent by the failure of the owners or the officers of the ship properly to care for or treat his hurt.

VI. He may be injured by a physical act of violence committed upon him (*a*) by the master, (*b*) by one of the subordinate officers of the ship or, (*c*) by another seaman.

I.

The legal rights of seamen injured by accident during their employment (without the fault of any other person) reveal the marked difference in the status of mariners as compared with

workingmen on land. For whereas an employee ashore in such case would have no claim against his employer, either at law or in equity, and would be obliged to bear his loss, the seaman is entitled to the expenses of his maintenance and cure, to his wages as if he had served out the voyage, and to his passage back to the port of shipment, or (if the ship has been obliged to leave him in a foreign port) to the cost of his passage back — even if the seaman himself is not free from blame. This is an ancient doctrine of the admiralty found in whole or in part in the maritime codes, and has recently been stated by the Supreme Court of the United States,[1] as follows:

"That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

While the doctrine has always been recognized in this country, a conflict has nevertheless existed upon the question as to just how long the right of the seaman thus to be cured at the expense of the ship continues. Some courts, following Mr. Justice Story, have held that the liability of the ship and her owners lasts until the seaman's cure is completed, "at least so far as the ordinary medical means extend."[2] In other quarters this ruling has been questioned upon the ground that the liability terminates with the seaman's contract,[3] and there has been a decided hesitancy, to say the least, to extend the obligation of ship and owners beyond the end of the voyage shipped for, in the absence of neglect of the seaman by the officers after his injury.[4] While there has not been

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[1] The Osceola, 189 U. S. 158, at 175.

[2] Reed *v.* Canfield, 1 Sumn. (U. S. C. C.) 195, Story, J. at 202–203; The Lizzie Frank, 31 Fed. Rep. 477; Whitney *v.* Olsen, 108 Fed. Rep. 292, at 297; and *cf.* The Troy, 121 Fed. Rep. 901, at 905.

[3] Nevitt *v.* Clarke, Olc. Adm. (U. S. Dist. Ct.) 316, per Betts, J.; The J. F. Card, 43 Fed. Rep. 92; and *cf.* The Tammerlane, 47 Fed. Rep. 822. In the J. F. Card, *supra*, Mr. Justice Brown, then district judge for the Eastern District of Michigan, speaking of sailors shipping on the Great Lakes, said (p. 95): "To say that the obligation of this ship extends to the cure of every man of its crew who happens to be taken sick or receives an injury while upon the vessel, no matter how long the disability may continue, would be imposing a burden upon vessel owners far beyond that contemplated by the law, or required in the interests of humanity. The court will take judicial notice of the fact that maritime hospitals are established on the principal lake ports for the nursing and cure of sailors, which are supported by deductions from their wages."

[4] See The Atlantic, Abb. Adm. 451; The Ben Flint, 1 Biss. (U. S. C. C.) 562; The City of Alexandria, 17 Fed. Rep. 390. In Raymond *v.* The Ella S. Thayer, 40 Fed. Rep. 902, the District Court for the Northern District of California took a middle

complete uniformity as to the amount of wages to which the seaman is entitled, no difficulty is presented when the injury is purely accidental.[1] And he is undoubtedly entitled to a return passage, or its cost, no matter how the injury was caused, if himself guilty of no misconduct.[2]

Neither of the disputed questions is definitely settled by the first proposition of Mr. Justice Brown in The Osceola, but no disapproval of Story's view is expressed,[3] and so far as the wording of the proposition is concerned, it can be interpreted to include maintenance and cure so long as there is reasonable necessity for charging the ship with the expense of the same.[4]

II.

The liability of vessel and owners for injuries happening to a seaman through negligence is also subject to the doctrine first stated, to wit; that the seaman is entitled as a matter of right to

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ground in stating that the seaman was "to receive at the vessel's expense, the ordinary medical assistance and treatment in cases of injury or acute disease *for a reasonable time.*"

[1] The diversity upon the subject of wages is the result of the distinction made in cases involving negligence or misconduct upon the part of the ship's officers. The general rule of law is that the injured seaman is entitled to the wages of the voyage and no more, and this regardless of the cause of the injury, whether the result of an accident or of the negligence of another member of the ship's company. But in some of the southern districts the courts, following the lead of Judge Woods (afterwards an associate justice of the Supreme Court), have allowed wages for a further period when the officers have been found to be in fault. Thus *cf.* Longstreet *v.* The R. R. Springer, 4 Fed. Rep. 671; The City of Alexandria, 17 Fed. Rep. 390; The Gov. Ames, 55 Fed. Rep. 327; Olsen *v.* Whitney, 109 Fed. Rep. 80; allowing wages to the end of the voyage, with Myers *v.* Hopkins, 1 Woods (U. S.) 170, "wages until the seaman is restored"; Brown *v.* The D. S. Cage, 1 Woods (U. S.) 401, "wages during his recovery"; The Centennial, 10 Fed. Rep. 397, "full wages until recovered"; The Natchez, 73 Fed. Rep. 267, at 270, "full wages." The term "full wages" is that employed in Art. VII of the Laws of Oleron, referring to a seamar incapacitated by sickness, and has been interpreted to mean the wages which the mariner would have received had he served out the voyage. See Walton *v.* The Ship Neptune, 1 Pet. Adm. (U. S. Dist. Ct.) 142, at 145; Sims *v.* Jackson, 1 Wash. 414; and *cf.* Laws of the Hanse Towns, Art. XLV.

[2] The Atlantic, Abb. Adm. 451, at 481; Brunent *v.* Taber, 1 Sprague (U. S. Dist. Ct.) 243; Callon *v.* Williams, 2 Low. 1; The Centennial, 10 Fed. Rep. 397; The Natchez, 73 Fed. Rep. 267; *cf.* Willendson *v.* The Forsoket, 1 Pet. Adm. (U. S. Dist. Ct.) 197, at 198, for the general proposition; Harvey *v.* Smith, 35 Fed. Rep. 367, a decision under the British Merchant Shipping Act; and see as to the modern French Code, The Osceola, 189 U. S. 158, at 169.

[3] *Cf.* McCarron *v.* Dominion Ry. Co., 134 Fed. Rep. 762.

[4] See The Kenilworth, 137 Fed. Rep. 1003: s. c. 139 Fed. Rep. 59. In The Atlantic, Abb. Adm. 451, Judge Betts, although holding the obligation of the ship to the

the expenses of his maintenance and cure and to the other perquisites of a disabled mariner. And this is the limit of their liability if the negligence were committed in the ordinary course of the navigation and employment of the ship. The seaman is not entitled to damages at the maritime law for injuries so received. This, again, is an ancient precept, in effect but a reiteration of the first in a different form, and is expressed by the court in The Osceola in the following language:[1]

"That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The precise scope of this, the fourth proposition of Mr. Justice Brown, has not been appreciated by the lower courts, some judges seeming to think, as will shortly appear, that a change in the law has been made. Indeed, the force of the doctrine thus restated by the Supreme Court has never been fully recognized by federal magistrates, with the result that in almost all cases involving negligence on board ship, and especially in cases involving negligence on the part of some member of the ship's company other than the master, recovery has been denied on the ground that the injured and negligent parties were *fellow servants*. And what is more unfortunate, a seeming approval of this method of deciding the issue is contained in The Osceola. That case (decided March 2, 1903) was a cause *in rem* against a steamer, brought by a seaman seeking to recover damages for personal injuries sustained by him through the negligence of the master, in ordering him to get ready a freight gangway for unloading while the ship was yet at

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mariner to be limited in duration to that of the latter to the ship, adds at p. 480: "This rule may undoubtedly be subject to variations. When a course of medical treatment, necessary and appropriate to the cure of the seaman, has been commenced and is in a course of favorable termination, there would be an impressive propriety in holding the ship chargeable with its completion, at least for a reasonable time after the voyage is ended or the mariner is at home. So, also, in case due attention to his case has been improperly omitted by the ship abroad, or his case has been improperly treated, the courts may properly enforce against the ship this great duty toward disabled mariners, even after her contracts are terminated, upon the ground of failure to perform towards them the obligation in the shipping contract." In England, by a recent decision, the ship-owners' liability for medical and surgical attendance is said to be at an end after the seaman "has been brought back to a home port." Anderson *v.* Rayner (1903), 1 K. B. 589.

[1] 189 U. S. 158, at 175.

sea and proceeding with good speed against a head wind. In his opinion, Mr. Justice Brown reviews a number of authorities, English and American, relating to the liability of ship and owners for injuries to seamen, and then proceeds to state four propositions with respect to which, as a result of the review, the court were of the opinion that the law might be considered to be settled. Two of the propositions have already been quoted, and they were sufficient to dispose of the case. But, in addition, the court laid down two other propositions which are *dicta:*

"2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. Scarff *v.* Metcalf, 107 N. Y. 211.

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure."

Proposition 3 states the fellow servant doctrine as the same has been applied by the federal courts. This application of a common law rule to the adjudication of marine causes is criticised by Frederic Cunningham, Esquire, in an article which appeared in this REVIEW, upon the ground that it is not necessary because "the doctrine of *respondeat superior* when properly applied does not have its full force in the admiralty."[1] Relying upon the fact that the third "settled" proposition of the court in The Osceola was not essential to the decision of the case, Mr. Cunningham expresses the hope that when the fellow servant question is fairly presented to the Supreme Court it will exclude the doctrine from the admiralty jurisprudence as it did the common law rule of contributory negligence in The Max Morris.[2] We heartily join in this hope.

III.

Liability for injuries due to defective appliances, in this country, is governed by the second proposition of Mr. Justice Brown, quoted above. A *dictum* so far as the case presented was con-

[1] "The Extension of the Fellow Servant Doctrine to the Admiralty," 18 HARV. L. REV. 294. February, 1905.

[2] 137 U. S. 1.

cerned, for it was not contended that there was any defect in the appliances used, the proposition yet embodies the principle of numerous decisions in the federal courts, and is characterized by the Supreme Court as a "wholesome" doctrine which they are "not disposed to disturb."[1] In England the subject is covered by statute, the Merchants' Shipping Act[2] importing into every contract of service between the owner of a ship and the seaman on board an implied obligation:

"That the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same."

This statutory provision has been strictly construed by the English courts. In Hedley *v.* Pinkney & Sons S. S. Co.,[3] a case where a vessel was sent to sea with stanchions and rails on board but not in place, and a sailor was drowned in a storm because of the failure of the master to set up the appliances, it was held that the representatives of the deceased had no claim for damages: first, because the master and seamen were fellow servants, and, secondly, because notwithstanding it was unsafe for the vessel to leave port without setting up the stanchions and rails, the ship was not unseaworthy within the meaning of the law; the House of Lords being of opinion that the words of the act, to "keep her in a seaworthy condition for the voyage during the same," did not mean to impose liability for a "neglect properly to use the appliances on board a ship well equipped and furnished."[4]

The American cases, on the other hand, have not restricted the ground of the seaman's right to recover to the owners' negligence in furnishing the ship at commencement of the voyage, but have held ship and owners to an indemnity for injuries resulting from the failure of the latter's agents, the officers of the ship, to keep the ship and her appliances in condition even when she was not under their personal supervision.[5] This is the explanation

[1] The Osceola, 189 U. S. 158, at 175.

[2] 39 & 40 Vict. c. 80, s. 5 (1876); 57 & 58 Vict. c. 60, s. 458 (1894).

[3] (1894) A. C. *222.*

[4] Compare the earlier cases of Couch *v.* Steel, 3 E. & B. 402 (1854); Searle *v.* Lindsay, 11 C. B. (N. S.) 429 (1861).

[5] The ruling in Couch *v.* Steel that there is no implied warranty of seaworthiness in a contract of shipment is not followed in this country. 2 Parsons, Shipp. & Adm., 1869 ed., 78, note; The Noddleburn, 28 Fed. Rep. 855, at 857.

of the decision of Mr. Justice Gray in The A. Heaton,[1] where a seaman was injured through the breaking of a defective gasket, as to the condition of which the master was seasonably warned, and likewise of that in The Noddleburn,[2] where the master of a British vessel knowingly allowed a crane line to remain in an unsecure condition. Both vessels were held liable to the seaman hurt in consequence of the neglect of the master to make the rigging safe. These two cases, together with the decisions of Judge Addison Brown in The Frank and Willie[3] and The Julia Fowler,[4] are referred to in The Osceola without disapproval. All are actions *in rem*, but the courts rendering the decisions made no distinction because of the form of procedure.[5] In the second of the New York cases the district judge uses the following language: "The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seamen, and the deliberate use of rigging, or methods plainly unsafe, affects both ship and owners with liability for the consequent damage." And the decision in Scarff *v.* Metcalf,[6] cited by Mr. Justice Brown with his second proposition, rests expressly upon the ground that "the master stands as the agent and representative of the owners, and his negligence is theirs." As the action in that case was solely for *improper treatment after injury*, the conclusion is reached that the Supreme Court regards a failure to maintain the appliances of the ship in the same light as a failure to entertain proper care of a sick or injured seaman, and considers both cases as instances where an owner is liable for the neglect of the officers of the ship as the acts of his personal agents in the performance of positive duties imposed upon him.[7]

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[1] 43 Fed. Rep. 592.

[2] 28 Fed. Rep. 855.

[3] 45 Fed. Rep. 494.

[4] 49 Fed. Rep. 277.

[5] It is interesting to note in this connection that in The Lamington, 87 Fed. Rep. 752, the District Court for the Eastern District of New York found that the British Shipping Act gave a personal remedy against the ship-owner for unseaworthiness, but did not confer a right of action *in rem*.

[6] 107 N. Y. 211.

[7] The ship was held in The Julia Fowler for the negligence of the mate in furnishing a seaman with a defective rope and ordering him to use the same. The negligence complained of in The Frank and Willie was that of a mate in requiring libellant after notice to work in a dangerous place when discharging the ship's cargo, the court saying: "This was breach of a duty owed by the ship and owners to the seaman, for which the ship and owners are liable. . . . The principle involved, viz.: the duty to provide reasonable security against danger to life and limb, by at least the usual methods, when these dangers are brought home to the knowledge of the proper officers, is manifestly a

It is for negligence alone that ship and owners are held. With respect to injuries resulting to seamen from latent defects not discoverable by the exercise of due care, there is no liability.[1]

IV.

The requirements with respect to the equipment of a ship enumerated as the fourth cause of injury, are regulated in England and America largely by statute, but in neither country have the courts hesitated to hold both vessel and owners liable to a seaman for injuries resulting in consequence of the failure of the owners to fulfil the requirements of the law, in the absence of an exclusive remedy provided by the law. And the result is the same whether the neglect is that of the owners themselves, or of their agent, the master of the vessel.[2]

V.

The lower courts of the United States held for a long time without question that for any neglect on the part of the master or officers of a vessel to give a seaman proper care and treatment after he had been injured in the service of the ship, both ship and owners were liable to the seaman in consequential damages. The principle seems first to have been applied in Brown *v.* Overton,[3] decided in March, 1859, on a libel *in personam* against the master. And it was subsequently stated by Judge Brown of New York in the City of Alexandria,[4] in the following manner: [5]

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general one. It attends the seaman wherever he is required to go on shipboard in the performance of his duties, and applies as much to a dangerous condition of a cargo as to defective rigging or a rotten spar. . . . It has been long held the ship's duty to use all reasonable means to cure seamen of their hurts in the ship's service, neglect of which makes ship and owner liable. It would be anomalous to enforce such a duty to cure hurts, but none to avoid them."

[1] The Lizzie Frank, 31 Fed. Rep. 477; The Concord, 58 Fed. Rep. 913; The Robt. C. M'Quillen, 91 Fed. Rep. 685.

[2] Thus the court allowed consequential damages in the following instances: Couch *v.* Steel, 3 E. & B. 402, owners' failure to supply ship with medicines; Collins *v.* Wheeler, 1 Sprague (U. S. Dist. Ct.) 188, owners' failure to supply ship with proper food; The F. F. Oakes, 82 Fed. Rep. 759, master's failure to supply ship with proper food; Baxter *v.* Doe, 142 Mass. 558, master's failure to furnish seaman with suitable food and anti-scorbutics, — under British Merchant Shipping Act; The Rence, 46 Fed. Rep. 805, at 807, master's failure to furnish seaman with anti-scorbutics, — under U. S. Statutes.

[3] 1 Sprague (U. S. Dist. Ct.) 462.

[4] 17 Fed. Rep. 390, at 395.

[5] Libellant was injured by falling through a hatchway negligently left open, for which alone the maritime law furnishes no indemnity.

"Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a different and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing; and if this be neglected the ship may be held to consequential damages."

Succeeding these decisions there has appeared a long line of cases holding both ship and owners.[1]

This right of the seaman to hold ship and owners for acts of the master and subordinate officers was never doubted until after the appearance of the opinion of the Supreme Court in The Osceola. When The Troop (an action by a seaman against a British vessel for excessive and unnecessary suffering after he had been injured and permanently disabled by a fall from a yard arm of the ship) appeared before the Circuit Court of Appeals for the Ninth Circuit, Ross, Circuit J., dissented from the decision of the court, affirming a decree in favor of the seaman, on the ground "That by the law of England the ship is not liable *in rem* for the damages claimed, and that under the decision of the Supreme Court in the case of The Osceola the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew."[2] The majority did not think the English law prevented a recovery, and could not find in the general terms of the language of the Supreme Court in the principal case, that it was intended to establish "a rule narrower than that recognized by the more recent decisions of the federal courts, that the master and the crew are fellow servants only as to matters connected with the navigation of the ship, but that the master of a ship at sea represents the owners in respect to the personal duties and obligations which they owe the seaman."[3] They furthermore pointed out that the opinion in The Osceola expressed no disapproval of the doctrine of Brown *v.* Overton and the City of Alexandria, but incidentally cited both cases. Judge Ross' quandary is one instance of the

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[1] See for example Peterson *v.* The Chandos, 4 Fed. Rep. 645; Whitney *v.* Olsen, 108 Fed. Rep. 292; The Iroquois, 113 Fed. Rep. 964; s. c. 118 Fed. Rep. 1003; failure to put into port when practicable; The Vigilant, 30 Fed. Rep. 288; The Scotland, 42 Fed. Rep. 925; The Troop, 118 Fed. Rep. 769; s. c. 128 Fed. Rep. 856; failure to secure medical or surgical assistance when possible; The City of Carlisle, 39 Fed. Rep. 807; gross neglect and cruel treatment; The Eva B. Hall, 114 Fed. Rep. 755; wrongfully and unnecessarily compelling a seaman to work after he was injured.

[2] 128 Fed. Rep. 856, at 863.

[3] *Ibid.*, at 858.

misconception we have referred to of the meaning of the fourth proposition in The Osceola, now happily determined; for the recent decision of the Supreme Court in The Iroquois,[1] affirming without a dissenting voice the decrees of the lower courts in favor of the seaman libellant for negligent treatment after injury, sustains the view taken by the majority judges and has put an end to all doubt as to the scope of the opinion in The Osceola with respect to such acts of negligence, at least so far as the liability of the ship herself is concerned.

The question under consideration seems never to have been adjudicated by a British court, but a careful review of the English law failed to convince the Circuit Court of Appeals in The Troop that there is any difference between the law of England and America as to the ship's duty to a seaman, after he has been injured in the service. In the absence of express authority, however, and in view of the strict interpretation which the English courts have placed upon the statutory rights of seamen, the matter is certainly not free from doubt.[2]

VI.

The state of the law upon the question of the liability of ship and owners for violence to the person of a seaman by other members of the ship's company is most unsatisfactory.

From the days of the maritime codes it has been deemed the duty of the master to protect a seaman, not only against the cruelty of his officers, but against any oppression or ill-usage on the part of other seamen.[3] Failing to interfere in the seaman's behalf when such ill-treatment has taken place in his presence, or when he has been seasonably informed of the same, the master has

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[1] 194 U. S. 240, Opinion by Mr. Justice Brown.

[2] This does not mean that the right of the seaman to proceed against the ship for general damages is absolutely denied in England. As witness The Justitia, 12 P. D. 145 (1887), in which the seaman recovered because the vessel was employed for a purpose different from that contemplated in the contract of shipment. The tendency seems to be to regard the Merchant Shipping Act of 1894 as providing a personal remedy only, except in the case of the seaman's claim for wages. See The Troop, *supra*, and The Lamington, 87 Fed. Rep. 752, at 755. But note the provisions of the statute cited by the Circuit Court of Appeals in the former case, and especially the proviso in the section relating to medical advice and attendance; 57 & 58 Vict. c. 60, s. 207 (4); Scrutton, Merchant Shipp. Act (1894) 162, note, citing The Justitia, *supra*.

[3] Curtis, Merchant Seamen (1841) 26, 27.

always been held responsible in damages.[1] And at least two cases have held the ship for such neglect, on the ground that the master's failure to intercede is "in violation of the implied contract that such protection will be afforded."[2] In the first of these cases, Judge Hanford justifies his decision by saying, that the rule denying a right of action for injuries resulting from the negligence of the ship's officers is "not applicable in a case where the negligence complained of amounts to a breach of duty on the part of the owner or master of a ship, which owner or master is obligated to perform personally." And the obligation of the master while at sea to protect the crew from violence and brutal treatment he held to be such a duty. But in the recent case of The Astral,[3] the District Court for the Eastern District of Pennsylvania dismissed a libel founded upon similar facts, for the alleged reason that The Osceola had authoritatively decided the ship and her owners were not liable in such an action. This ruling is founded upon Mr. Justice Brown's fourth proposition, and we shall consider later the correctness of its application.

While in The Lizzie Burrill (the second of the cases referred to) the master, as well as other officers of the ship, was guilty of an assault upon the seaman, the gravamen of the action is regarded by the court as the master's failure to furnish protection. We are now to consider the cases in which it was sought to hold ship and owners liable by reason of the assault itself; in the first place when committed by the master.

(*a*) In the common law case of Gabrielson *v.* Waydell, heard first in the state courts of New York,[4] the seaman on being ordered by the mate to "turn to" answered that he was sick and not able to go on deck. Whereupon the captain of the vessel came to the forecastle and getting a reply similar to that received by the mate, struck the plaintiff a number of times with his fist and then kicked him in the leg, breaking the bone below the knee. Suit was brought to recover damages for the injury, both master and owners being joined as defendants, but the former was not served with process and the case went to trial against the

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[1] Thomas *v.* Lane, 2 Sumn. (U. S. C. C) 1; Shorey *v.* Rennell, 1 Sprague (U. S. Dist. Ct.) 407; Hanson *v.* Fowle, 1 Saw. (U. S. C. C.) 537; Murray *v.* White, 9 Fed. Rep. 562.

[2] The Marion Chilcott, 95 Fed. Rep. 688; The Lizzie Burrill, 115 Fed. Rep. 1015.

[3] 134 Fed. Rep. 1017.

[4] 135 N. Y. 1.

owners alone. The Court of Appeals of New York divided four to three for a reversal of the judgment of the lower court in favor of the seaman, the issue being stated by Gray, J. (who wrote the opinion of the court) as follows: "Whether the owners of a vessel can be made liable in damages for the wilful and malicious act of their captain in assaulting and injuring a seaman while upon the high seas."

The trial judge proceeded on the theory that the captain was the representative or *alter ego* of the owner, and that the wilful and malicious nature of the captain's act constituted no ground for an exception to the liability of the owners, if the act were performed within the general scope or course of his employment, and he therefore left it to the jury to decide whether the captain acted in the line of his duty. The Court of Appeals were unanimous in believing the case was governed by the precepts of the admiralty, but the majority were of opinion that there was nothing in the evidence or in the principles of the maritime law which justified the act as coming within a proper or intended exercise of authority, especially as it was criminal in its nature. The minority took the ground that the plaintiff's injuries were the direct result of the owners' failure to observe their contract obligations and duties, saying that one of the guarantees which the maritime law has accorded the sailor and implied in his contract of shipment, is "that he shall have good treatment and be protected from unnecessary violence." This obligation they declared the master, acting as the representative of the owners, "deliberately violated,"[1] and the owners were therefore liable, there being no ground to distinguish the case in principle from Scarff *v.* Metcalf.

Failing to secure redress in the state court, the plaintiff then brought another action for the same cause in the Circuit Court of the United States for the Eastern District of New York,[2] and there he recovered, the court regarding the act as done by the master in his representative capacity, and stating that the action might be considered to be "rather for breach of duty of good treatment and care than for violation of the person," the position in fact taken by the dissenters in the Court of Appeals, to which dissent the federal court expressly refers.

All of the members of the appellate court were of the opinion

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[1] 135 N. Y. 1, at 17 and 21.

[2] Gabrielson *v.* Waydell, 67 Fed. Rep. 342.

that master and seaman occupied the position of fellow servants in the general undertaking relative to the navigation and employment of the ship, the minority, however, differing in considering the captain's act as something more than the assault of one employee upon another. In England, also, master and seaman are said to be in a common employment, at least at the common law.[1] But the federal courts of this country in their interpretation of the fellow servant rule have been inclined to *exclude* the master;[2] and this brings us to the consideration of those cases in which the act of violence is committed by some officer other than the master. Does the American admiralty provide the seaman a remedy against ship and owners for such an offense, and if not, is it because they are fellow servants?

(*b*) In the case of Hall *v.* Sims[3] (commonly cited as The Gen. Rucker) the owners of a steamboat were held liable for personal injuries sustained by the libellant as the result of a blow on the head dealt by the mate with a monkey-wrench. The mate and libellant were engaged in the common employment of unloading the steamer when the assault took place; and while libellant held the somewhat anomalous position of "roustabout" (half longshoreman and half deck-hand), the court made no distinction because of the character of his employment, but mulcted the defendant on the general ground that, to quote directly:

"A mate driving a seaman or other laborer to speedier work or better work in loading the cargo, by blows, is acting for the owner, in any fair sense whatever."

No reference to the fellow servant rule is found in the opinion, although the case was avowedly decided upon common law principles. In Memphis Packet Co. *v.* Hill[4] the facts were not dissimilar. There a deck-hand was designated by the mate of appellant's steamer (the mate holding at the time the position of master) to act as "captain of the watch" for the purpose of having some hay moved from one part of the boat to another, and while the boat was under way. As such captain the deck-hand became the boss of his co-laborers and they were required to obey his orders. Libellant was one of the deck-hands employed in moving the hay,

[1] See Hedley *v.* Pinkney & Sons S. S. Co. (1894), A. C. 222.

[2] The Osceola, 189 U. S. 158, at 175, Proposition 3; The Troop, 128 Fed. Rep. 856, at 860.

[3] 35 Fed. Rep. 152.

[4] 122 Fed. Rep. 246.

and while thus engaged he stopped to tie a handkerchief around his neck; whereupon the "watch-captain," without any cause or provocation, and for the purpose of compelling the libellant to work more rapidly, struck him with a heavy stick, breaking his arm. The company defended on the ground that it was not liable to one servant for injuries caused by the negligence of another. The court, however, unanimously held the fellow servant doctrine had no application to the case; that the two employees were not working side by side as fellow servants, but that the "watch-captain" was for the time being an officer of the vessel, as such was acting for the owner, and the owner was therefore liable for the assault.

(*c*) In neither England nor America does it appear that ship or owner has ever been held for the assault of one seaman upon another.

What are the principles governing the determination of causes involving the rights of seamen for personal injuries to be derived from this study of the law? First, it is to be noted as a fundamental proposition that, generally speaking, neither ship nor owner is liable to an indemnity for the physical hurts of seamen. The seaman's claim because of such injuries is restricted in the ordinary case to those perquisites which the maritime law, from its very beginning, has accorded the wounded or disabled mariner.[1] This general rule is a pure doctrine of the admiralty sufficient to decide the ordinary actions of seamen for injuries received aboard-ship without the assistance of any other legal principle or system of law, and so far as it recognizes the seaman, is construed most favorably to him. The only condition imposed upon the right of an injured seaman to the perquisites mentioned is that the injury must take place in the service of the ship and not be occasioned by the seaman's own fault, or happen while he is in the pursuit of his own pleasure. And the term "service of the ship" is an elastic one, being "by no means limited to acts done for the benefit of the ship or in the actual performance of the seaman's duty on board." It is enough if the injuries are received by him

[1] Laws of Oleron, Arts. VI., VII.; Laws of Wisby, Arts. XVIII., XIX.; Laws of the Hanse Towns, Arts. XXXIX., XLV.; Marine Ordinances of Louis XIV., Bk. III., Title IV., Art. XI.; and see The City of Alexandria, 17 Fed. Rep. 390. The right of the seaman to be returned to the port of shipment seems to be a later development.

in his capacity as seaman, for "a sailor must, in judgment of law, be deemed in the service of the ship whilst under the power and authority of its officers."[1] To work a forfeiture of his right, the mariner's wound or disability must have resulted from "vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, wilful disobedience of orders, and persistent neglect of duty."[2] "Ordinary negligence consistent with good faith and an honest intention to do his duty is not sufficient."[3]

Such being the fundamental law, the decisions allowing the recovery of damages are, in fact, nothing less than exceptions. The exceptions have been made by the courts in two classes of cases: first, where there has been the breach of a positive duty owed the seaman; and second (in the case of injuries resulting from the violence of another person), where the offender has been an officer of the vessel, and at the time about the business of the ship and acting in the owners' behalf. In both classes ship and owners are said to be liable to the seaman beyond the mere expense of caring for and curing him, and providing his passage home. The ground of liability in the first instance is, in reality, *breach of contract*, although the action may sound in tort, and the principle involved is not unlike that of the common law which refuses to deny recovery to the workman on land, when the employer has failed to perform one of his so-called non-assignable duties. The contract in question in the maritime law, however, is usually evidenced by a writing — the shipping articles — which are executed by both owners and seaman, the former binding themselves through their agent, the master. The second ground of liability is to be found in the law of agency. The seaman's contract is ordinarily broken by some act of negligence. The act which makes an owner liable as principal, on the other hand, is an intentional wrong.

In considering the question of the responsibility in damages of ship and owners for breach of the shipping contract, the difficulty presented does not concern either the existence or the justice of the principle involved, but arises with the problem as to just what duties are imposed upon ship and owners with respect to seamen by the maritime law, for the shipping articles commonly do not

[1] Ringold *v.* Crocker, Abb. Adm. 344, at 346, per Betts, J.

[2] The Ben Flint, 1 Biss. (U. S. C. C.) 562, per Miller, J.

[3] The Chandos, 4 Fed. Rep. 645, at 651.

set forth all of the obligations which the law implies. That a ship owner is under certain obligations to the crews of his vessel by virtue of their entry into his service has never been denied. Some of these obligations are well defined. Others have been suggested, but have not, as yet, received the consideration or approval of the highest tribunals. Thus we have seen that in America, at least, there is a positive duty to accord good treatment to a seaman after he has been injured in the service of the ship, and that for the failure of the officers to fulfil the obligation ship and owners are liable in consequential damages.[1] Also the owners must see to it that the rigging and appliances of the ship are at all times reasonably safe and that they are not negligently allowed to become defective, else they and the vessel will be liable to the same extent for an injury resulting to one of the crew.[2] And the neglect to supply the ship with food and medicines in accordance with the positive law of the country, and to furnish them to the crew during the voyage, is the breach of another duty which gives the seaman the right to claim compensation from ship and owners for his suffering.[3] The seaman, to be sure, can recover only once, but he has an election whether to proceed *in personam* or *in rem*.

Are there any further obligations of the same character? Judge Hanford added one, to wit: the obligation to furnish protection to the mariner while in the service,[4] and his view seems to be supported by authority. In his "Treatise on Merchant Seamen" Mr. George Ticknor Curtis takes pains to enumerate what he terms "certain of the general obligations of the parties to the mariner's contract," saying: "Although the articles are wholly silent upon such points, law and reason will imply certain engagements on the part of the master and owner to the mariner which are equally as imperative as those expressed in writing."[5] Among the obligations thus set forth, and as a result of the failure

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[1] The Iroquois, 194 U. S. 240.

[2] The Osceola, 189 U. S. 185, at 175, Proposition 2. And this means that the vessel must be seaworthy and properly equipped in all particulars. If she is sent to sea improperly manned, the owner has not done his full duty. Brown *v.* The D. S. Cage, 1 Woods (U. S.) 401; The Lizzie Frank, 31 Fed. Rep. 477, at 480.

[3] Dixon *v.* The Cyrus, 2 Pet. Adm. (U. S. Dist. Ct.) 407, at 411, and cases cited under IV, *supra*.

[4] The Marion Chilcott, 95 Fed. Rep. 688.

[5] Curtis, Merchant Seamen 19, adopting the language of Judge Richard Peters. See Dixon *v.* The Cyrus, 2 Pet. Adm. (U. S. Dist. Ct.) 407, at 411; Rice *v.* The Polly and Kitty, *ibid.* 420 at 421.

to perform which, injury may result to a seaman, are given the three which we have mentioned as unquestionably established. Mr. Curtis's fifth general obligation is, "That the mariner shall be treated with decency and humanity by the master and the officers and by his ship-mates."[1] The learned author then proceeds to discuss the duty of the master to accord protection. Granted the existence of this obligation as a contractual duty, any breach of it upon the part of the master ought to make the vessel owners liable, as the act of their personal agent, to no less extent than in the case of the other positive duties imposed by the law. And being persuaded that the obligation does so exist, we are compelled to differ with the decision of the court in The Astral,[2] heretofore referred to. In that case Judge McPherson said he was "unable to draw a tenable distinction between the master's fault in giving a wrong order, which was the negligence complained of in The Osceola, and his fault in failing to maintain proper discipline on the ship and to protect the members of the crew from abuse at the hands of subordinate officers," closing as follows: "Neglect of duty is negligence, and for negligence on the part of the master it has now been authoritatively decided that the ship and her owners are not liable in an action of this kind." It is respectfully submitted that there is a difference between the faults committed by the masters in these two cases, and that the ruling of the district judge is a misapplication of the fourth proposition set forth by Mr. Justice Brown. The neglect of duty complained of in the case before the Supreme Court was committed in the ordinary course of the navigation of the ship, the breach of the commonplace obligation upon the part of one person to use due care not to injure another, for which sort of negligence the maritime law prescribes no right to an indemnity from the owners because in no way personal to them. The neglect in The Astral, on the other hand, was a breach of duty of the positive sort imposed upon the owners as a personal matter by virtue of the seaman's contract with them. We do not believe that the Supreme Court intended so sweeping an interpretation as that of the District Court to be placed on the fourth proposition in The Osceola, otherwise the force of the second proposition is destroyed, and to follow out Judge McPherson's decision that any neglect of duty is negligence for which the ship and her owners

[1] Merchant Seamen 26.

[2] 134 Fed. Rep. 1017.

are not liable, we should be obliged not only to deny recovery in the case of injuries resulting to seamen from unfit appliances, but also to override the decision in The Iroquois. Logically to deny liability in cases like The Astral it is incumbent upon the courts to decide that the duty to protect is not implied in the seamen's contract of service, and then we should face the anomaly which Judge Addison Brown has described in The Frank and Willie, namely, that of enforcing "a duty to cure hurts, but none to avoid them." We believe the duty to protect seamen against unnecessary violence is implied in their contract of service, and that both ship and owners are liable for the master's neglect with respect to this important obligation, and we maintain also that the fourth proposition of Mr. Justice Brown is confined to negligent acts incident to the *handling* of the ship and to the performance of the ordinary labor of officers and seamen with respect to the ship and her cargo.[1] The Supreme Court was restricted by the questions expressly stated in The Osceola,[2] to the decision of the ship's liability for a "negligent order of the master in respect of the *navigation and management of the vessel*," and "*under the circumstances declared.*" The opinion is, therefore, not to be given any broader interpretation.[3]

Further than the duty just discussed, which must be performed by the master, is there any general obligation imposed upon the owners to furnish the seaman at all times with good treatment, and, if so, what officers are included in its performance? That such an obligation is implied in the contract of shipment to the extent of making the owners liable for maltreatment of a seaman by the *master*, was the opinion of the minority judges in Gabrielson *v.* Waydell,[4] relying upon both text-books and cases, and the same view seems to have been taken by Judge Wheeler in the United States court. If the decision in the Circuit Court hinges entirely on the fact that the seaman was sick when assaulted by the master, then the rule to be derived from the case is but a statement in a different form of that promulgated by Judge Sprague in Brown *v.* Overton, and may be written: that for any misconduct toward or maltreatment of a seaman after he has *fallen sick* in the service of the ship, the vessel and her owners are liable in damages. That

[1] *Cf.* The Gov. Ames, 55 Fed. Rep. 327; The City of Alexandria, 17 Fed. Rep. 390.
[2] 189 U. S. 158, at 160.
[3] See The Troop, 128 Fed. Rep. 850, 858, 861.
[4] 135 N. Y. 1, at 16–20 especially.

is, so far as the obligation of the owners to care for the seamen is concerned, there is no difference whether they are disabled by sickness or injury, and this is unquestionably the law.[1] No reason suggests itself for making a distinction, and the duty is ordinarily stated in the text-books to include both causes of disablement.[2] But we believe that Judge Wheeler intended to state a broader ground of liability and to declare a vessel owner liable for any failure of the master to accord proper treatment to the crew, whether sick or well. The language used by the learned judge is, "To wrongfully make a seaman *sick or sicker* would seem to be as much a breach of the duty to cure as wrongful neglect to cure existing sickness would be."[3] The duty referred to by the court is the duty to cure, but the principle involved is the same. Indeed Judge Betts says in The Atlantic:[4] "The term *cure* was probably employed originally in the sense of *taking charge* or *care of* a disabled seaman and not in that of positive healing."[5]

Both law and reason seem to point to the liability of vessel and owners for the master's personal failure properly to treat a seaman as well as for his neglect to enforce good treatment of the mariner by others. That this duty of the master to refrain from personal acts of violence has not always been held to be a contractual one, and especially of the sort for the breach of which the owners are responsible, is undoubtedly true. For while, in the case of Croucher *v.* Oakman,[6] the Supreme Court of Massachusetts held the owners of a bark liable in contract to the mate, for an injury sustained by the

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[1] Reed *v.* Canfield, 1 Sumn. (U. S. C. C.) 195; The Ben Flint, 1 Biss. (U. S. C. C.) 562; The A. Heaton, 43 Fed. Rep. 592, at 595; *cf.* The Iroquois, 194 U. S. 240; Laws of Oleron, Arts. VI., VII.; Laws of Wisby, Arts. XVIII., XIX.; Laws of Hanse Towns, Arts. XXXIX., XLV.; Ordinances of Louis XIV., Bk. III., Title IV., Art. XI.

[2] 2 Parsons, Shipp. and Adm., 1869 ed., 81; Curtis, Merchant Seamen 27–28; Abbott on Shipping, Part 2, ch. 6, s. 3.

[3] 67 Fed. Rep. 342, at 344.

[4] Abb. Adm. 451, at 480.

[5] Although the decision of the Circuit Court in the Gabrielson case rests in part upon the opinion of the Supreme Court of the United States in Railway Co. *v.* Ross, 112 U. S. 377 (holding the conductor of a train not to be a fellow servant of the engineer), a case which has been considerably shaken by later adjudications of the same tribunal (R. R. Co. *v.* Baugh, 149 U. S. 368, and R. R. Co. *v.* Conroy, 175 U. S. 323), the circumstance does not affect the force of Judge Wheeler's reasoning upon the maritime principle involved. And indeed he would have no cause to reach a different result to-day when it is considered that the third proposition in The Osceola fails to include the ship-master in the enumeration of those engaged in the common employment aboard the vessel.

[6] 3 Allen 185.

act of the master in wounding and discharging him in a foreign port, the district court of the same state in a similar case — brought against the master — did not comprehend the personal tort to be a violation of the contract of hiring.[1] But if the master is under an obligation to protect his crew, then, *a fortiori*, his own maltreatment of the seaman is a denial of the protection, and ship and owners are liable whether we describe the offense in words of ill treatment or not. And the liability follows whether the master is acting "for the owner" or is merely satisfying a personal grudge. Either is a breach of the positive duty owed the mariner.

Undoubtedly a vessel owner is liable to a third party for such acts only as are committed by the ship captain when acting within the scope of his employment, but a seaman is not such a stranger. He and the owners are bound together by contractual ties, and by contract the ordinary duties of one person to another, in the community, can be greatly extended. The additional obligations need not always be expressed. They are sometimes implied, as in the case of the carrier. The law imports many promises into the contract of a carrier with its passengers. One is that the passenger shall be carried safely, and if he be injured through the carelessness or violence of the carriers' agents, the passenger has a right of action to recover damages for breach of the contract. We see no reason why the seamen's claim to compensation for physical injuries cannot be founded upon a similar principle.[2] Nothing can be gained by regarding the seaman's suit for damages as a claim for "additional wages."[3] Indeed we maintain that, except as given in the form of a penalty by statute, no wages can be recovered for any period beyond the termination of the contract of service by the completion of the voyage shipped for. The exception established by Judge Woods in Meyers *v.* Hopkins,[4] allowing the seaman wages until restored, regardless of the ending of the voyage, in the case of injuries received through the negligence or misconduct of an

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[1] See Crapo *v.* Allen, 1 Sprague (U. S. Dist. Ct.) 184.

[2] See 2 Parsons, Shipp. and Adm. 26 *et seq.*, at 29 and 30 especially; Benedict, Admiralty, 3d ed. § 309. In Spencer *v.* Kelly, 32 Fed. Rep. 838, the court charged the jury, "To make the defendant liable for the conduct of the master of his vessel, it must be shown that in the infliction of the injury complained of in this case the master was acting within the scope of his duty as such master, and in the exercise of his control over the plaintiff on that occasion." But the cause was not regarded by the court as anything more than an action of tort.

[3] See Brown *v.* The Bradish Johnson, 1 Woods (U. S.) 301.

[4] 1 Woods (U. S.) 170, cited under 1, *supra*.

officer, is, it is submitted, unsound in principle. Furthermore the seaman does not sue for wages alone. His action is ordinarily described, in the technical language of the libel, as a *cause of damage*, or of *damage for personal injuries*.[1] This is comprehensive and would seem to embrace all the damage he has suffered by reason of his injury, physical and otherwise. He asks for the expenses of his maintenance and cure and for the wages of the voyage, if the ship has not paid these bills as the maritime law requires, and in addition he seeks damages for the assault or injury itself.[2]

Whatever ground is taken as the correct one for holding ship and owners for an act of violence committed by the master upon a seaman, there does not seem to be any justification for the decision of the Court of Appeals in Gabrielson *v.* Waydell. In the first place, there was sufficient evidence to warrant the jury in finding that the plaintiff was sick upon the occasion in question, and that he had a reasonable excuse for his failure to give prompt obedience to orders. The master's brutal assault upon him was, therefore, a neglect to accord that treatment and care which the maritime law has always stipulated should be furnished the disabled mariner, with a resulting liability upon ship and owners for breach of the obligation. And furthermore, leaving out of consideration the existence of any duty upon the part of the master to *protect* a seaman from injury — by the acts of others or by his (the master's) own acts — it is submitted that the conduct of the master in this case was so much within the line of his duty as to make the owners liable under the law of agency. Had the master assaulted Gabrielson out of mere spite, it might very well have been questioned whether the owners were liable for the offense as principals; but the facts do not present such a case. The blows were delivered, as the evidence shows, in the course of the master's endeavor to secure obedience from, as he supposed, a refractory seaman, and the mere fact that he may have misjudged the plaintiff or have used more force than was reasonable and necessary does not make the act any less one within the scope of his employment or release the owners from liability. It is now well recognized that the wilfulness of the agent's act is no excuse,

[1] See Curtis, Merchant Seamen 337, speaking of a libel for assault.

[2] *Cf.* The City of Carlisle, 39 Fed. Rep. 807, at 817; The Troy, 121 Fed. Rep. 901, at 906; The Svealand, 132 Fed. Rep. 932; s. c. 136 Fed. Rep. 109; and see also Oakman, *supra*, at 188; Memphis Co. *v.* Hill, 122 Fed. Rep. 246, at 247.

if the act were within the general scope of the authority conferred upon him, and the character of wilfulness, *per se*, does not place the act without the limits of such authority.[1]

Excepting the liability for failure of the master to treat his crew with decency, we have not been able to discover any general obligation to accord the seamen good treatment so imposed by the maritime law as to make ship and owners liable to an indemnity for injuries occasioned by a single act of violence upon the part of some other officer. Both books and cases contain frequent allusions to the humane character of the treatment which the mariners must receive on board ship;[2] but the language used is very general, and in place of prescribing a duty which the shipowners must perform through all the officers, is, we believe, but a description of the master's duty to protect the seamen and keep the peace at sea. Thus Lord Tenderden says,[3] "The duties of the mariners and the master are reciprocal; from the former are due obedience and respect, from the latter, protection and good treatment." We are led to the conclusion that the duty to furnish good treatment to the mariner and to protect him from ill treatment are one and the same obligation, and that a breach is committed only by the master's failure to see that the obligation is carried out. Unless, therefore, the misconduct of an inferior officer consists of frequent acts of oppression or violence, so that the master must be said to be in fault for not interfering in the seaman's behalf, or unless a single assault takes place in the master's presence, in such a way that he can be said to have made it his own, the seaman would seem to have no remedy because of his

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[1] It is difficult to appreciate the weight of Judge Gray's contention that the owners were not liable because the master's act was "criminal in nature"; for the offense was civil as well, and as such quite within the scope of his authority as commanding officer of the vessel. Hence the owner's *civil* liability would not seem to be affected. See Mechem, Agency § 745. The decision may be explained by the peculiar reluctance of the common law courts of New York to regard a wilful act as one committed in the course of the agent's employment: see Wright *v.* Wilcox, 19 Wend. (N. Y.) 343; Rounds *v.* R. R., 64 N. Y. 129; and Mr. Curtis seems to have entertained a similar view of the limit of the principal's liability. Merchant Seamen, 339–340. But this view we apprehend is not law to-day in most jurisdictions. Mechem, Agency §§ 740–741; Hughes, Admiralty § 106, note.

[2] See 1 Parsons, Maritime Law, 1859 ed., 476; Kay, Shipmasters and Seamen, 2d ed., 331; Curtis, Merchant Seamen 26; Rice *v.* The Polly and Kitty, 2 Pet. Adm. (U. S. Dist. Ct.) 420; Magee *v.* The Moss, Gilp. (U. S. Dist. Ct.) 219, at 228; Gould *v.* Christianson, Blatchf. & H. Adm 507; The Lizzie Burrill, 115 Fed. Rep. 1015.

[3] Abbott, Shipping, Part 2, c. 4, s. 3.

contract with the owners. And the seaman is thus barred from recovery if the motive of the subordinate officer is personal to him. For an owner is liable under the law of agency, as we have found, only when the officer is acting within the scope of his employment. Furthermore, if there be no guaranty of good treatment by all the officers at all times, binding the ship, the *res* itself cannot very well be held liable for the act of the individual officer. The case is different from that of injuries occasioned by collision, or by a physical act such as was perpetrated in a recent case by a tugboat, rightly named The Bulley.[1]

It might be well for the uniformity of the maritime law if the rights of seamen to general damages for physical injuries were made to depend entirely upon contract, but until the highest courts sanction a construction of the shipping contract so liberal as to include the duty of good treatment in its most comprehensive sense, his rights must be governed in part by the law of agency. In opposition to the liberal interpretation of the seaman's contractual rights, it will undoubtedly be suggested that it is extending the vessel owners' liability to too great an extent, and so much so as to be unjust, to hold him for all the tortious acts of the ship's officers towards a seaman. And the objection is certainly of great weight. But when we consider the peculiar nature of the employment of a ship, — by owners who remain at home with almost no supervision over their property after the vessel sails from port, so that by necessity great responsibility is vested in their agents for the voyage, — the hardship is more apparent than real, and if either party is to suffer by reason of the situation it should be the owner and not the sailor. The officer is liable over to the owners for his misconduct, and if the former be financially worthless the owners are better able to bear the loss than the injured mariner. Furthermore, the admiralty does not award damages for personal injuries with the same liberality as do courts of law.[2] Nevertheless, the wisdom of adopting too sweeping a construction may well be doubted.[3]

One thing, however, seems clear in principle, which is, that if

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[1] 138 Fed. Rep. 170, ranging alongside another vessel and deluging her with steam and hot water.

[2] See The Gen. Rucker, 35 Fed. Rep. 152, at 158.

[3] And yet it is difficult to term that law satisfactory which excuses an owner if his officer is careful to exercise his brutality upon a well seaman, but declares him responsible should the mariner happen to be ill.

the seaman be denied a right of action against the owners for a hurt received as the result of an uncalled-for assault by a subordinate officer, not connected with the performance of his personal duties, it is *not* because they are fellow servants. The seaman's status is *sui generis*, totally unlike that of workingmen on land, and the fellow servant doctrine, it is respectfully submitted, is not amphibious. After they had adopted the doctrine the federal courts did not construe it to cover all the relations of the ship's company. Thus we find Judge Addison Brown, in The Scotland,[1] a case of negligent treatment after injury, making this statement: "The obligation of the master in this respect was an obligation wholly independent of their relation as fellow servants in navigating the ship." And we quote again the words of the Circuit Court of Appeals in The Troop: "The master and the crew are fellow servants only as to matters connected with the navigation of the ship." In The Osceola,[2] however, the Supreme Court did not find it necessary to express an opinion on the second question suggested by the lower court, namely: "Whether in the *navigation and management* of a vessel, the master of a vessel and the crew are fellow servants," although they subsequently declared, in a *dictum*, that the other members of the ship's company were so related. The case was decided by answering the other questions presented by a resort to the maritime law, the court holding that, according to well-recognized principles of the admiralty, the ship was not liable in damages for the negligence complained of. The point we desire to impress is, therefore, this: if it is unnecessary to turn to the common law to decide that a ship is not liable for the negligence of the *master* in matters of the vessel's navigation and management, it is unnecessary also when the negligent act is that of some other officer. And the case is not different when in place of negligent navigation and management we have an intentional wrong committed on board the ship, or in the course of her employment, whether the act is connected with the offender's duties or wholly outside them. The fellow servant doctrine in both instances is superfluous.

In The Iroquois[3] Mr. Justice Brown says: "The general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is

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[1] 42 Fed. Rep. 925.

[2] 189 U. S. 158, at 160 and 168.

[3] 194 U. S. 240, at 243.

peculiarly applicable to the case of seamen."[1] Not even at common law, however, does the employee assume the risk of injury through the employer's failure to fulfil his positive duties.[2] Nor, furthermore, would it seem the risk of injury by the abusive treatment of a superior placed over him with authority to command him, as in the case of a seaman.[3] The law certainly justifies the conclusions reached in The General Rucker and Memphis Co *v.* Hill. The power of the ship-master over seamen is great, including, as it does, the right to punish for offenses, a prerogative in no way possessed by foremen or superintendents on land. To say, therefore, that master and seaman are "fellow servants" when the former is exercising this authority is little short of the ridiculous. Nor can we perceive the relation of fellow servants to exist when a subordinate officer of a vessel is exerting his authority, as a commander, to compel obedience to his lawful orders. If the master act with moderation, when chastising a seaman, neither he nor the owners are liable. If he exceed the bounds of reasonableness, the act is a breach of the seaman's contract. And similarly, if the subordinate officer act immoderately, the owner must bear the consequences according to the accepted rules of agency, if the command and its attempted enforcement took place in the course of his employment. Otherwise there is no liability at the maritime law.

Under no doctrine of the admiralty can ship or owners be held in damages for the act of one seaman in assaulting another, unless at the time the offender happens to be acting as an officer of the vessel, assuming, of course, that there is no neglect on the part of the master.

Rule 16 of the Admiralty Rules of the Supreme Court provides that, "In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." As a result the federal courts have persistently refused to entertain jurisdiction of a damage claim for an assault, when joined with a libel *in rem* for wages.[4] But where

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[1] But see Rothwell *v.* Hutchinson, 13 Ct. of Sess. Cas. (4th ser.) 463.

[2] 1 Labatt, Master and Servant §§ 2 and 270; Kalleck *v.* Deering, 161 Mass. 469, at 470, 471.

[3] See Wood, Master and Servant 875; 2 Labatt, Master and Servant § 537, at p. 1540.

[4] See The Guiding Star, 1 Fed. Rep. 347, and cases cited; The Lyman D. Foster, 85 Fed. Rep. 987; The Falls of Keltie, 114 Fed. Rep. 357.

the libel has proceeded on the theory that the master was at fault in not preventing the act of abuse, a proceeding against the ship has been sustained notwithstanding the rule,[1] and even when the master joined in maltreating the seaman.[2] The reason given for the exception is that the action is founded upon something more than the mere tort because of the existence of a distinct duty on the part of the master. In other words, the gravamen of the complaint being breach of contract, the 16th rule does not exempt the ship from seizure merely because the act constituting the breach consisted of an "assault or beating." And this view is supported by no less an authority than the learned author of Benedict's Admiralty.[3] We respectfully submit that it is sound.

The conclusions reached may be summed up as follows:

(1) That in the case of an injury by *accident*, the seaman is entitled to no indemnity.

(2) That in the case of an injury resulting from *negligence* there is likewise no right to an indemnity, unless the act or acts of negligence constitute a breach of some contractual duty.

(3) That in the case of an *intentional* injury no indemnity can be recovered, unless the wrong also amounts to a breach of a contractual duty or unless the offender was at the time acting as the agent of the owner and within the scope of his employment.

(4) If *any* injury happen while the seaman is in the "service of the ship," he is entitled to maintenance and cure, to his wages and a passage back to the port of shipment, or the cost of the same — in the absence of wilful misconduct upon his own part.

(5) If an *intentional* injury is a breach of the shipping contract, the ship, in America, is liable *in rem*.

These statements, we believe, represent the law. The questions to be settled include the enumeration and definition of the implied obligations of the shipping contract (especially with respect to the

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[1] The Marion Chilcott, 95 Fed. Rep. 688.

[2] The Lizzie Burrill, 115 Fed. Rep. 1015.

[3] The American Admiralty, by E. C. Benedict, 3d ed., § 309, but see The Guiding Star, 1 Fed. Rep. 347, at 348. In The Miami, 78 Fed. Rep. 818, Judge Toulmin dismissed a libel *in rem* by a "stowaway," seeking damages for personal injuries inflicted by the master, on the ground that the libellant was a trespasser and there had been no breach of a contractual or maritime duty owed him, declaring that the suit was not in the nature of an action upon the case (as contended by libellant), but an assault and battery and hence within Rule 16. This judge was also the author of the opinion in The Lizzie Burrill.

treatment due the mariner), the delimitation of the duration of the disabled mariner's right to cure and maintenance and of the period during which he is entitled to wages, and a decision as to the adaptability to the admiralty of the fellow servant doctrine.

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